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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1671

DALE C. RICHARDSON,
Petitioner,

vs.

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,
and
LOCAL 7495, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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JURISDICTION

The jurisdictional requisites are appropriately stated in the petition at pages 3-4.

OPINIONS BELOW

The opinions of the courts below are printed in the petitioner's appendix.

QUESTIONS PRESENTED FOR REVIEW

1. Where a party entitled to an award of attorney's fees fails adequately to substantiate the time which he expended upon the case, did the Court of Appeals err in holding that the trial court had not abused its discretion in allowing what it regarded as a reasonable fee given the character of the case?

2. Did the Court of Appeals err in holding that an instruction that a union member is not generally an agent of a union, and that therefore his acts are only chargeable to the union if they are authorized or ratified, when taken in the context of a group of instructions which also allowed findings of liability for acts of union members on other grounds, did not misstate the applicable law.

3. Did the Court of Appeals err in holding that the court had not abused its discretion in allowing a new trial on the grounds of excessiveness of verdict, where a $250,000.00 verdict was allowed solely for mental anguish unaccompanied by physical injury of any kind, the trial court regarded the verdict as so excessive that a reasonable remittitur could not be estimated, and the issues of liability and damage were so interwoven that a partial new trial on the damage issue only was not possible?

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STATEMENT OF THE CASE

This suit was commenced by petitioner as an action by a former employee against his employer, the Western Electric Company, the International, which was the certi-

fied bargaining agent for employees in Western Electric establishments, such as that in which petitioner was employed, and the Local, which represented the Western Electric employees at the Omaha warehouse where petitioner had been employed. The suit was brought pursuant to Section 301 of the Labor Management Relations Act, 29 U. S. C. Section 185. In the original complaint, petitioner sued for breach of contract. He relied on a nondiscrimination clause contained in the collective bargaining agreement, and he sued his employer, the International, and the Local, as joint obligors under the nondiscrimination clause. He included in his complaint for breach of contract allegations with regard to the infliction of mental distress upon him. Because the suit was for breach of contract, the District Court limited damages for loss of employment to the term of the existing collective bargaining agreement. Since federal jurisdiction was bottomed on the claim for breach of contract and the ordinary contract rule is that damages for mental anguish are not allowed in contract, the District Court treated the claim for mental anguish as a pendant state law claim involving the tort of intentional infliction of mental distress. The District Court exercised its discretion to dismiss the pendant claim so that it could be filed in a state court.

At the first trial, the jury found separately as against both the International and the Local that each would not have fairly represented petitioner in a grievance procedure after his termination had he requested that they do so. The jury found separately as against the International and the Local that each had violated the contract

provision against discrimination against nonunion members, and that each had been a proximate cause of petitioner's discharge from his employment at Western Electric, which discharge was found to be wrongful. The jury awarded petitioner damages of $20,000.00 which were eventually limited by the trial court to $1,500.00 because of the expiration date of the collective bargaining agreement.

Petitioner appealed to the Eighth Circuit attacking both the limitation of damages to the term of the contract and the refusal to submit the mental distress damage issue. On appeal, that Court rejected the limitation of damages for wrongful discharge to the period of the collective bargaining agreement. With regard to the claim for damages for mental anguish, the Court noted that petitioner had erred in treating his claim against the Unions as a claim for breach of contract. The Court characterized the claim as analogous to a claim for breach of fiduciary duty, and held that damages for mental anguish could be allowed by analogy to parasitic recovery of damages for mental anguish in intentional tort cases. On the claim for damages for lost employment, the Court treated the liability of Western Electric and each Union as established and limited the retrial to the issue of the amount of damages and appropriate allocation among the parties. In addition, the Court authorized petitioner to file a second claim against the Union for mental distress. It directed that the mental anguish claim be submitted to the jury "on both liability and damages." *Richardson v. Communication Workers of America,* 443 F. 2d 974, 985 n. 14 (8th Cir. 1971).

Following on the reversal of judgment in the first case, Petitioner filed an amended complaint. The complaint stated two claims. The first claim against both the employer and the two Unions for wrongful discharge, and the second claim against only the two Unions for mental anguish. A second trial was held. On the first claim for the loss of employment the jury awarded petitioner $92,000.00, apportioned 30% to Western Electric and 70% to the two Unions, pursuant to the District Court's direction to treat the liability of the two Unions as joint. Upon petitioner's second claim, the jury awarded him $250,000.00.

After considering a motion for new trial made by both Unions, the District Court granted a new trial on the second claim because of excessive damage, but denied it on the first. A judgment was entered after the new trial order was overruled. The Unions appealed on the first claim, and petitioner appealed on the grant of the motion for new trial. Both orders were held to be nonfinal. *Richardson v. Communication Workers of America,* 469 F. 2d 333 (8th Cir. 1972).

On December 5, 1972, a Rule 54 (b) certificate was issued with regard to the first claim. On December 15, 1972, Petitioner filed a motion pursuant to Rule 52 (b) of the Federal Rules of Civil Procedure to modify the December 5, 1972 judgment to make allowances for attorney's fees. The December 5th judgment had allowed costs, but made no reference to attorney's fees.

On December 18, 1972, both Unions filed notices of appeal from the judgment of December 5, 1972.

Petitioner took no steps to have the appeal from the December 5, 1972 judgment dismissed because of the filing of the Rule 52 (b) motion. Rather, on March 15, 1973, he filed a motion requesting that the issue of attorney's fees be set aside until after a new trial on his second claim.

On December 26, 1973, the Court of Appeals affirmed the judgment for petitioner on his first claim. *Richardson v. Communication Workers of America,* 497 F. 2d 408 (8th Cir. 1973).

On January 24, 1974, a cashier's check was drawn on the National Savings and Trust Company of Washington, D. C. The check was made payable to Dale C. Richardson and Edward F. Fogarty, attorney. It was in the sum of $70,148.88, covering the judgment of December 5, and the costs allowed. Upon the back of such check appeared the following legend:

> "Settlement in full of judgment in Civil Action 02673, First Cause of Action, United States District Court for the District of Nebraska."

Petitioner and his attorney caused such check to be cashed. On January 31, 1974, the petitioner, through his attorney, filed a satisfaction of judgment and costs in the District Court.

A third trial was held limited to the mental anguish claim. At this trial it was undisputed that petitioner was treated to a considerable amount of hostile conduct by some of his fellow employees at Western Electric from the time he quit the local in January of 1966 until his termination by Western Electric in September of 1966.

Petitioner's theory of the case was that this conduct was engendered by the Local, and that the Local was acting as an agent for the International.

Each of the two Unions separately defended. The defense of the International was that it was not involved in any wrongdoing against petitioner. None of its officers were involved in any wrongdoing, the Local was not acting as agent of the International. The defense of the Local was based upon the theory that any acts against petitioner were acts of personal hostilty by individual members of the Local, and that the Local was not their principle when such acts took place.

Petitioner's claim for mental anguish involved conduct by a large number of individuals over a seven month period. In determining the amount of plaintiff's damages, it was necessary for the jury to determine as to particular acts of harrassment, whether the Local was liable for that act under principles of agency, and if so, whether the International was liable for such act of the Local under agency principles, before damages for distress caused by the incident could be awarded petitioner.

The questions of agency as to the International and the Local were submitted to the jury under a detailed charge concerning respondeat superior liability, authorization, ratification, and conspiracy. The jury found in favor of each defendant.

After the third trial but before entry of judgment, petitioner called up his motion for fees. The District Court awarded petitioner $10,000.00 in fees on his first claim upon which he had prevailed. The District Court did not award fees on the basis that this was a fund case.

Nor did the District Court award fees on the basis that the Unions were guilty of bad faith in litigating. Rather, the Court held that because of the bad faith involved in a breach of the duty of fair representation, an award of attorney's fees was justified.

Judgment was then entered for both Unions on petitioner's second claim and for petitioner on his fee award. Petitioner appealed to the Eighth Circuit attacking the judgment on the second claim and the amount of the fee award. The Unions cross-appealed claiming the case was not a proper case for an award of fees.

The Eighth Circuit affirmed in all respects.

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ARGUMENT

Introduction

Each of the three matters upon which petitioner seeks review, the size of the fee allowed him, the jury instruction on agency, and the grant of the new trial, are matters peculiar to this case. None of the questions upon which petitioner seeks review are matters of general importance to the administration either of federal procedural law or of federal labor law. Thus, the Court of Appeals held that petitioner was not in a position to complain of the fee allowed his counsel, since counsel had not adequately documented his time. The Court of Appeals held that the one paragraph instruction on agency to which petitioner objected, when taken in the context of the nearly four pages of instruction on agency law given by the trial court, was not erroneous. The Court of Appeals, applying the usual standard that it may review a grant of new trial

for abuse of discretion, held that there was no abuse of discretion upon the facts of this case. In other words, all of the questions upon which petitioner seeks review are precisely the kinds of questions unique to an individual case, which the certiorari jurisdiction of this Court is designed to leave for final resolution at the Court of Appeals.

1. *Where petitioner's counsel failed to properly document his time, the Court of Appeals properly held that petitioner was in no position to complain of an allowance of fee upon the basis that it did not properly represent the value of services performed, when the time spent in performing those services had not been established.*[1]

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1 Petitioner challenges the failure of the trial court, firmed by the Court of Appeals, to allow him his expenses of litigation in addition to the attorney's fees. Plaintiff was allowed his costs on his first claim by the judgment. Costs were taxed by the clerk in the regular way. Plaintiff was allowed certain costs on appeal. Costs were taxed by the Clerk of the Court of Appeals in the regular way. No exception was taken to the costs taxed. Costs must be challenged within five days after they are taxed by the Clerk of the District Court, Federal Rules of Civil Procedure, Rule 54(d), and the allowable costs on appeal are specified in the Federal Rules of Appellate Procedure, Rule 39, and were allowed. Plaintiff did not attack the taxing of costs as required by Rule 54(d) and obtained all the costs to which he was entitled under Rule 39. The Court of Appeals held that his claim for additional costs and expenses came to late. In addition, plaintiff filed a Satisfaction of Judgment in the District Court on January 31, 1974, which included costs. While petitioner claims that his attorney's fees was not encompassed within the satisfaction, he never contended the costs and expenses were not covered by the satisfaction. Therefore, the claim that the District Court erred in not allowing such costs and expenses was clearly incorrect. The Court of Appeals so held. (Appendix p. 13.)

Petitioner's additional claim that costs should not have been taxed against him in the District Court after the third trial was never raised in the Court of Appeals. It obviously comes too late now.

In *Grunin v. International House of Pancakes,* 513 F. 2d 114, 127, 128 (8th Cir. 1975), the 8th Circuit held that counsel seeking a fee allowance had the burden of establishing the amount of time which he had devoted to the performance of the services for which he sought fees. Petitioner had prevailed on one claim but not on another. Under the District Court decision, he was entitled to a fee on the claim upon which he had prevailed, but not entitled to a fee for losing. However, petitioner's counsel submitted time affidavits, which did not allocate his time as between the two claims. While he now claims that the trial court could have performed this task, the burden was upon him to do so.[2]

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2 The time affidavits filed by petiitoner's counsel were the product of afterthought and estimation, rather than of accurate timekeeping. As an example, petitioner's counsel estimated that it took him 22 hours to assemble an appendix for a prior application for certiorari in this Court (Trans. 50-51). He estimated that it took him an hour to copy the form notice of appeal (Trans. 51). He estimated that all of his briefs required four hours per page to prepare. He did not keep time, rather he multiplied the number of pages in a brief by four to arrive at his research and writing time (Trans. 53). Counsel included in his time summary a large number of items which can only be described as frolics of his own. For example he listed fifteen hours for a trip to St. Louis on November 14, 1972. He went to St. Louis to make oral argument in an appeal, despite the fact that the Court of Appeals had issued an order stating that there would be no oral argument in the case. Plaintiff's counsel felt that it was his right, despite the Court of Appeals' order, to go to St. Louis and demand an opportunity for oral argument. Yet, he sought to charge the unions for this time. Petitioner's counsel sought a fee valued at $75.00 an hour. However, as of the time he withdrew from the private practice of law in Omaha, Nebraska, to become an employee of the State of California, petitioner's counsel had seldom charged more than $25.00 an hour (Trans. 47). A great part of the work involved in this case took place at a time when petitioner's counsel was charging $25.00 an hour. At that rate, the $10,000.00 fee would cover 400 hours. Given that petitioner's counsel did not keep accurate time

(Continued on next page)

It was not the District Court's burden to sift through these records and attempt to allocate time between the two claims. Since petitioner was entitled to a fee upon only one claim, and since his counsel had not properly allocated his time between the claim upon which petitioner was entitled a fee and the claim upon which he was not entitled to fees, the Court of Appeals properly held that he was not in a position to complain about the fee allowed.

2. *There was no error in the instruction upon agency given by the trial court.*

The trial court charged the jury that:

> "The members of the defendant local union are not agents of the defendant local union. The actions of an individual member of the defendant local union do not bind the defendant local union unless the defendant local union either authorized or ratified the acts in question." (Appendix p. 92.)

The petitioner contends that this instruction was erroneous. That contention is without foundation.

Section 301 (e) of the Labor Management Relations Act was intended to measure "the responsibility of a union for the acts of its members and officers . . . by reference to ordinary doctrines of agency." *United Mine Workers of America v. Gibbs,* 383 U. S. 715, 736 (1966). An individual member of a union is not an agent of the union. *United States v. White,* 322 U. S. 694, 702 (1944). As Senator Taft noted in his explanation of Section 301 (e):

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sheets, given that a method of estimating was used which in many instances produced totally exaggerated time estimates, given that petitioner's counsel made no effort to separate time between the first and second claim, the allowance of a $10,000.00 fee was clearly reasonable and not an abuse of discretion.

> "I think that the word 'agent' as used here, as used in the contract section, and as used in other places in the bill means an agent under the ordinary rules of agency, an agent of the labor union, the organization as such. The fact that a man was a member of a labor organization in my opinion would be no evidence whatever to show that he was an agent." 93 Cong. Rec. 4435 (1947).

In order to charge one person with liability for the acts of another person, not his agent, the one must become personally liable for the acts of the other by either authorizing those acts or by ratifying those acts. *Restatement Agency 2d,* Sec. 215, p. 466; *Restatement Agency 2d,* Sec. 218, p. 476; Seavey, *Agency,* Sec. 82, pp. 137-138. The same principles are applicable to a labor union. "The actions of one individual member no more bind the union than they bind another individual member *unless there is proof that the union authorized or ratified the acts in question. United States v. White,* supra, 322 U. S. 702. (Emphasis supplied.) Those principles were embodied in the trial court's charge.

Other instructions given by the trial court permitted the jury to find the unions liable for acts of members, if they had become agents of the union or had engaged in concerted activity with agents of the union. (Appendix 89-90.) As the Court of Appeals noted, "plaintiff's objections failed to take into consideration the instructions as a whole." (Appendix p. 9.) Taken as a group, the trial court's instructions constitute an accurate precise statement of the law of agency.

3. *The Court of Appeals properly found that there was no abuse of discretion by the trial court in the grant of the new trial.*

(a) The Eighth Circuit takes the view that the question of granting or not granting a new trial on the grounds of excessiveness of the verdict is primarily for the trial court. The circuit reviews the trial court's decision for abuse of discretion. *Solomon Dehydrating Company v. Guyton,* 294 F. 2d 439, 447, 448 (8th Cir. 1961); *Krall v. Crouch Brothers, Inc.,* 473 F. 2d 717, 718, 719, (8th Cir. 1973); *Snodgrass v. Nelson,* 503 F. 2d 94, 96 (8th Cir. 1974). The Eighth Circuit practice does not appear essentially dissimilar from the practice in other circuits. Wright, *Federal Courts,* 2d, Sec. 95, pp. 421-423; 6A Moore, *Federal Practice,* para. 59.08 (6), pp. 59-184, 59-191.

Petitioner attempts to create a conflict between the Eighth Circuit rule and the rule announced by the District of Columbia Circuit in *Taylor v. Washington Terminal Co.,* 409 F. 2d 145, 148-149 (1969). However, it is difficult to see what distinction the petitioner is attempting to draw between the practice of the two circuits. As the *Taylor* case makes clear, abuse of discretion can be found when the trial judge sets aside a verdict which is clearly not excessive. That is just another way of defining an abuse of discretion, a case where the trial judge treated as excessive a verdict which clearly was not. See, 11 Wright & Miller, *Federal Practice & Procedure,* Sec. 2820, p. 135.

Petitioner likewise finds conflict between the Eighth Circuit's usual practice and its decision in *Fireman's Fund Insurance Co. v. Aalco Wrecking Co.,* 466 F. 2d 179 (1972). The *Fireman's Fund* case dealt with review of a decision to grant a new trial on the grounds that the verdict was against the weight of the evidence. The Eighth Circuit

has regularly held that it has authority to review a decision granting or denying a new trial for abuse of discretion. *Altricher v. Shell Oil Co.*, 263 F. 2d 377, 380 (8th Cir. 1959); *Perry v. Bertsch*, 441 F. 2d 939, 943 (8th Cir. 1971). In *Fireman's Fund Insurance Co. v. Aalco Wrecking Co., Inc.*, supra, the Court found an abuse of discretion. *Fireman's Fund Insurance Co. v. Aalco Wrecking Co., Inc.*, supra, which dealt with review of a new trial on the grounds that the verdict was against the weight of the evidence, does not purport to announce any new or different standard to be applied in cases where the grant of the new trial is on the grounds of excessiveness of the verdict. Cf. *Richardson v. Communication Workers of America*, supra, 486 F. 2d 807, where the author of the *Fireman's Fund*, opinion applied the usual Eighth Circuit standard on excessiveness in a prior appeal in this case.

The verdict here is $250,000.00. The course of conduct involved allegedly began in February and terminated in September, a period of seven months. It consisted in the main of the use of vile, derogatory epithets, either verbally to petitioner or posted upon signs around his workplace. On several occasions, petitioner's car was blocked on the company parking lot. The physical violence against petitioner consisted of the throwing of nuts and bolts and screws at him. In addition, petitioner was involved in three fights.

Petitioner suffered no permanent physical injury as the result of these events. He suffered no temporary physical discomfort which can unambiguously be related to these events. He never required psychotherapy or chemical therapy for distress or depression.

Petitioner's only damage was mental anguish. The trial court could properly believe that a $250,000.00 verdict for mental anguish unaccompanied by any physical suffering or injury was excessive in the extreme.[3]

(b) Petitioner claims that a remittitur should have been ordered, rather than a new trial. However, the trial judge was of the view that the verdict might have been "the result of passion, prejudice, mistake or some other inappropriate reason." (Appendix 44.) In such circumstances a remittitur would not have been proper. *Minneapolis, St. Paul and Sault Ste. Marie Ry. v. Moquin*, 283 U. S. 520, 521 (1931). In addition, the trial judge regarded the verdict as so excessive that he could not separate out the proper from the improper elements therein. (Appendix 45.) The Court of Appeals reviewed the trial judge's decision to utilize a new trial rather than a remittitur and found no abuse of discretion.

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3 There were other grounds for the grant of the new trial, which Court of Appeals did not have to address since it affirmed it upon the grounds of excessiveness of the verdict. There was the matter of the improper Golden Rule argument, which petitioner's counsel concedes that he made, Brief p. 34, which would usually justify the grant of a new trial. **Chicago N. W. Ry. v. Kelly,** 84 F. 2d 569, 576 (8th Cir. 1936). At the trial involved in the current appeal, the trial court instructed the jury that agency between the Local and the International was a question of fact for them to determine. The Court of Appeals held that that instruction was proper (Appendix p. 9), and, thus, by inference, held that the instruction given at the second trial, that agency existed as a matter of law, was improper.

Petitioner's claim that the evidence on agency was overwhelming at the second trial is belied by the jury verdict at the third trial. In each case, the evidence was virtually identical. Nor, is petitioner's claim that the Unions did not contest the agency issue until the appeal in the third trial accurate. Exception was taken to the trial court's erroneous treatment of the agency issue at the second trial. See, **Richardson v. Communication Workers of America,** 486 F. 2d 801 Note 6.

(c) Petitioner argues that even if a new trial was proper, it should have been limited to the issue of damages. However, partial new trial in this case would not have been proper. Petitioner's claim for mental anguish involved conduct by a large number of individuals over a seven month period. In determining the amount of petitioner's damages, it was necessary for the jury to determine as to each particular act of harassment, whether the Local was liable for that act under agency principles, and if so, whether the International was liable for the acts of the Local interagency principles. While the jury in the second trial made a general finding of liability for mental distress, that finding would have been of no aid to a jury in a subsequent trial, since it would still be necessary to separately determine liability as to each individual act before allowing damages for the anguish which it might have caused. Where, as here, the issues of liability and the issue of damages are interwoven, a partial new trial is not permissible. *Gasoline Products Co. v. Champlin Refining Co.*, 283 U. S. 494, 500-501 (1931).

The Court of Appeals separately reviewed the trial judge's decisions on each of these matters, his decision to grant a new trial, his decision to deny remittitur, and his decision to make the new trial a total one, it found no abuse of discretion in any of these decisions. It's finding that the trial court did not abuse its discretion was clearly correct.[4]

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4 The Court of Appeals properly rejected petitioner's claim that the trial court had misunderstood the nature of the damages being sought (Appendix 4 n. 7). The trial court opinion makes clear that the court knew that physical injury was not required. Rather, the

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CONCLUSION

The Court of Appeals gave appropriate deference to the trial court's decision on the new trial issue and the allowance of fees but it did so only after careful review of those issues. The instruction complained of was clearly correct. There is no occasion for further review of this case.

Respectfully submitted,

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point which the court was making, in dealing with physical injury, was that the jury's verdict was in the range that would only be appropriate where emotional distress "of a permanent and lasting nature, or . . . serious psychomatic illness" was involved (App. 44-45). The trial court did not find that distress had not occurred. As the court stated, "the court is not concerned that the trauma shown to have been suffered, if any, was not genuine, but only is concerned with the evidence as it relates to damages suffered."